No. 89-739 (3)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DAVIS ENTERPRISES, SUN PIPE LINE COMPANY, SUN COMPANY, INC., AND E.A. DESIGN, LTD.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY AND BRUCE DIAMOND,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Kenneth Scott, Esq.
*Bruce J. Chasan, Esq.
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER
Curtis Center, Suite 830 East
Independence Square West
Philadelphia, PA 19106
(215) 627-6900

Charles F. Lettow, Esq.
CLEARY, GOTTLIEB, STEEN & HAMILTON
1752 N Street, N.W.
Washington, DC 20036
(202) 728-2700

Attorneys for Petitioners Davis Enterprises, Sun Pipe Line Company, Sun Company, Inc. and E.A. Design, Ltd.

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**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA 19103 (215) 563-9000

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In the court of appeals, Judge Weis in dissent stated categorically that "the issue of whether the EPA properly refused to permit its employee to testify is squarely before us." Pet. App. A-18. He expressly noted there is no issue of either sovereign immunity or of "*Touhy* immunity for a subordinate" (Pet. App. A-18 & n.2), which had frustrated many prior challenges to an agency's refusal to allow an employee to testify. *See* the cases cited by the court of appeals at A-11 to A-12 (majority) and A-18 (Weis, J., dissenting), and by Respondents at Resp. Mem. Opp. 11 n.10. Correlatively, the majority in the court of appeals addressed frontally the three issues in the case, albeit reaching a result favoring EPA. Pet. App. A-11 to A-17. Thus, the questions reserved by this Court in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 469 (text accompanying n.9),

470-73 (Frankfurter, J., concurring) (1951), are fully and fairly posed by the petition. Respondents' veiled suggestion to the contrary, *i.e.*, that it is "extravagant" to deem each of those questions to be presented (Resp. Mem. Opp. 10 n.9), reflects a sudden, unwarranted shift by them in premises. Surprisingly, the agency has changed position regarding the effect of its regulation respecting testimony by its employees in private actions, 40 C.F.R. Part 2, Subpart C. Moreover, as discussed below, the agency's shift in position in this Court from that taken in the district court and the court of appeals provides an added impetus for this Court to grant the writ.

1.

In the court of appeals, as in the district court, the parties' arguments proceeded from the jurisdictional question respecting the reviewability of EPA's action, stated as the first question in the petition.[1] Petitioners contended that EPA's action in foreclosing factual testimony by its employee was reviewable agency action under the Administrative Procedure Act. Among other things, petitioners argued that EPA's regulations concerning such testimony provided at least some law for the court to apply. Pet. App. A-6 to A-11. EPA's contrary position was that there were no legal standards applicable to its action:

> The EPA on the other hand contends that 5 U.S.C. § 301 provides unfettered discretion on matters pertaining to control of its employees, that *the regulations do no more than provide a non-exclusive set of factors to be considered*

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1. Where a threshold jurisdictional issue is plainly and unavoidably extant in a case, as here, it surely is proper for petitioners at least to note that fact in the questions presented. Because of its jurisdictional nature, the reviewability question inheres in this case, and is within the power of this Court to consider, whether or not respondents would choose to raise it as an alternative ground for affirmance of the judgment below, *See, e.g., Harrison v. PPG Industries*, 446 U.S. 578, 586 (opinion of the Court by Stewart, J.), 595 (Blackmun, J., concurring in the result), and 602, 603 (Stevens, J., dissenting) (1980). Respondents' suggestion to the contrary (Resp. Mem. Opp. 6 & n.5) is erroneous.

> in making decisions as to whether to permit employee testimony in a given case, and that a reviewing court has no legal standard to apply. Thus, argues the EPA, the exception in 5 U.S.C. § 701(a)(2) is met.

Pet. App. A-9 (emphasis added).

Indeed, in the court of appeals, as in the district court, all involved, petitioners, respondents, the majority of the court of appeals, and the dissenter, agreed that EPA's regulations "did not state a legal standard" but rather merely "specif[ied] a number of relevant factors." Pet. App. A-10. Both the jurisdictional dispute and the merits turned on the legal consequences of this circumstance.

Now, however, in this Court respondents have abjured the posture that EPA's regulations provide "a non-exclusive set of factors to be considered." Pet. App. A-9, quoted *supra*. Instead, the regulations are said to provide an exclusive listing of factors constituting the "standard" upon which EPA's Regional Counsel was "required . . . to base his decision." Resp. Mem. Opp. 10.

This shift in position has no justification either in the prior proceedings in this case or in the regulations at issue. The shift seems designed to shut out from consideration the first principle applicable to this case, *i.e.*, the duty and obligation of any citizen, including an agency employee, to produce evidence in court. The principle is not stated in EPA's regulations. It is, however, fundamental to our jurisprudence, and it cannot be shunted aside by an interpretative maneuver.

In the court of appeals, the majority and the dissenter had common ground with the parties that the regulations established a non-exclusive list of factors. The disagreement arose over the weight to be accorded the chief factor not stated — the generally applicable duty of all persons to provide relevant testimony. In that regard, petitioners did not challenge the validity of EPA's regulations; it was not necessary to challenge a non-exclusive regulatory list of factors because any other pertinent factor could be and was raised.[2] However, petitioners challenge as contrary

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2. Perhaps it is not too surprising in the circumstances that EPA itself relies heavily (and mistakenly) on a factor not expressly stated in the

to law any newly proffered interpretation that deems the listing of factors in EPA's regulations to be exclusive and limiting.

2.

This Court's prior decisions touching on the duty of persons to testify in private civil litigation strongly support granting the writ in this case. In addition to the venerable line of cases cited by Judge Weis in dissent, Pet. App. A-18, less than a month ago this Court in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 58 U.S.L.W. 4093, 4095 (January 9, 1990), rejected a claim of privilege premised upon the functioning of colleges and universities. This claim had many features salient to EPA's reliance in this case on the housekeeping statute and the agency's functioning. In *University of Pennsylvania*, this Court observed:

> We do not create and apply an evidentiary privilege unless "it promotes sufficiently important interests to outweigh the need for probative evidence. . . ." *Trammel v. United States*, 445 U.S. 40, 51 (1980). Inasmuch as "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence,' " *id.*, at 50, quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950), any such privilege must "be strictly construed." 445 U.S. at 50.

3.

A judicial decision properly considering the duty of agency employees to provide testimony in private civil litigation is *Southeastern Pennsylvania Transportation Authority v. General Motors Corporation*, 103 F.R.D. 12 (E.D. Pa. 1984) (Van Artsdalen, J.) ("*SEPTA*"). This federal district court action concerned alleged breach of contract and breach of express and implied warranties by defendant (GM) in the sale of certain

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NOTES *(Continued)*

regulations, *i.e.*, a concern "future cumulative effect of similar requests could have a significant impact on the Agency's resources." Resp. Mem. Opp. 7.

buses to a municipal transit authority (SEPTA). SEPTA served a subpoena to take the deposition of a non-party federal government employee, David Perez, of the United States Department of Transportation (DOT), who had undertaken a study of the design aspect alleged to be defective. The government objected and moved to quash, citing DOT regulations (49 C.F.R. § 9.7 (1983)) which are very similar to the EPA regulations at issue in this case. *See* 103 F.R.D. at 14. The DOT regulations, however, flatly barred testimony of a DOT employee as an expert or opinion witness in any legal proceeding between private litigants.

Judge Van Artsdalen held that Perez would be ordered to testify as to facts but not opinions. 103 F.R.D. at 15. In his analysis, Judge Van Artsdalen judicially reviewed DOT's application of its regulations, and agreed with SEPTA's contention that DOT's decision not to permit Perez to testify as to factual matters was an unreasonable exercise of discretion. 103 F.R.D. at 14. He also held that the purposes of the DOT regulations would not be offended or undermined by allowing testimony on factual matters. DOT did not appeal.

In this case, as in *SEPTA*, the testimony sought is factual, not expert, in nature, and no other witness is competent to testify regarding the pertinent matter.

4.

The court of appeals acknowledged petitioners' need for the factual testimony of EPA's employee to provide a basis for the admission into evidence of results of air monitoring tests performed by the employee. Pet. App. A-3 to A-4. As the court of appeals said:

> For purposes of this appeal, we accept Appellants' representation that if they are unable to have the EPA results admitted, it could hamper their own experts' attempts to prove that the [gasoline] spill did not cause damage to the homeowners or their property because Pennsylvania law requires that expert opinion testimony be based on facts

admitted in evidence. *See Murray v. Siegal*, 413 Pa. 23, 195 A.2d 790 (1963).

Pet. App. A-4 to A-5.

In a long footnote concerning Pennsylvania law respecting the permissible bases for expert testimony, respondents suggest that expert witnesses may be able to rely on the EPA results in documentary form. Resp. Mem. Opp. 9 n.7. The short answer, however, is that the Pennsylvania court before which the civil damage claims are pending has been requested to make an *in limine* ruling that the EPA data is admissible but the court has refused to do so. Pet. App. A-4.[3] Correspondingly, respondents' offer to supply an affidavit does nothing to address the question of the admissibility of the EPA data.[4]

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3. In respect of their suggestion, respondents cite *In Re Glosser Bros., Inc.*, 382 Pa. Super. 177, 555 A.2d 129, 139-40 (1989), which applied Fed. R. Evid. 703 in upholding the admissibility of an accountant's expert testimony on the valuation of corporate stock. The Pennsylvania courts apply individual rules of the Federal Rules of Evidence on an *ad hoc* basis. In *Glosser Bros.*, the witness relied in part on an appraisal of certain corporate assets performed by Manufacturers' Appraisal Company, although no one from Manufacturers' was called to testify. *Id.*, 555 A.2d at 139. The court approved this use of inadmissible hearsay as a basis for the witness' expert testimony, in light of an exception to the general Pennsylvania rule. *Id.*, at 139-40. The Manufacturers' appraisal was the type of outside report routinely relied upon by accountants in doing a stock valuation, and the criteria of Fed. R. Evid. 703 were plainly met. *Id.*, at 140-42.

In the instant case, EPA does not routinely monitor private residences for air pollutants, and thus professionals could not routinely rely on such EPA data in the practice of their professions. Accordingly, the Pennsylvania appellate courts might well conclude that this case is not analogous to *Glosser Bros.* or to another area of exception to the Pennsylvania rule, a typical medical case, *e.g.*, where an oncologist might rely on the reports of a radiologist and a pathologist to diagnose and treat a cancer patient. It therefore remains speculative whether the EPA data can be admitted in documentary form over the objections of the homeowners.

4. EPA twice points out that it offered to provide Erdman's testimony by affidavit. Resp. Mem. Opp. 4 n.4 and 9 n.7. This underscores the arbitrary and unreasonable nature of the agency decision. An affiant cannot be cross-examined, and the homeowners would be deprived of the opportunity to adduce facts and inferences favorable to their position. It was illogical for the Regional Counsel to conclude that providing an affidavit does not "take sides," but a videotape deposition before all parties favors the petitioners.

A reversal of the Regional Counsel's decision may well have beneficial results. Right now the Newtown Crossing homeowners rely on the EPA's interpretation of its regulations as a means of excluding unfavorable factual evidence. If the EPA decision is reversed, the homeowners and other like-minded litigants may be encouraged to admit or stipulate factual evidence.

5.

The questions posed by this case are increasingly important to the administration of justice, as shown by the extensive (and procedurally frustrated) litigation over subpoenas issued to federal employees to obtain testimony. See Pet. App. A-11 to A-12 (majority) and A-18 (Weis, J., dissenting) and Resp. Mem. Opp. 11 n.10. The numerous requests to EPA for permission to take testimony from the agency's employees (Pet. App. A-16) also show the frequency with which these issues arise. The circumstances that (1) the majority of these requests were denied (*id.*), (2) *all* of the requests to EPA Region III have been refused (*id.*), and (3) there is a "current explosion in environmental litigation" (Resp. Mem. Opp. 11, quoting *Boron Oil Co. v. Downie*, 873 F.2d 67, 72 (4th Cir. 1989), also substantiate the need to resolve the issues reserved by this Court in *Touhy* and posed here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Kenneth Scott, Esq.
Bruce J. Chasan, Esq.
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
Curtis Center, Suite 830 East
Independence Square West
Philadelphia, PA 19106
(215) 627-6900

Charles F. Lettow, Esq.
CLEARY, GOTTLIEB,
STEEN & HAMILTON
1752 N Street, N. W.
Washington, DC 20036
(202) 728-2700

Attorneys for Petitioners
Davis Enterprises,
Sun Pipe Line Company,
Sun Company, Inc. and
E.A. Design, Ltd.

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